

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NOI PEARSON)	
Claimant)	
VS.)	
)	Docket No. 219,177
NORTH AMERICAN PHILIPS LIGHTING)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent requested Appeals Board review of the June 25, 1998, Award entered by then Assistant Director Brad E. Avery. The Appeals Board heard oral argument by telephone conference on February 3, 1999.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, C. Stanley Nelson of Salina, Kansas.

RECORD

The Appeals Board has considered the record listed in the Award. Additionally, the record contained four stipulations filed by the parties containing information and exhibits on average weekly wage, short-term disability payments, medical records, payroll records, and unpaid medical expenses.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award. Except, at oral argument, the parties agreed that the stipulations listed in the Award should be corrected to read that respondent was not self-insured but was insured by Travelers Insurance

Company on the alleged accident date; the medical expenses remaining unpaid totaled \$4,002.00 instead of \$4,409.40; and the claimant's average weekly wage, without fringe benefits included, was \$622.68 and with \$141.59 of fringe benefits included, was \$764.27.

ISSUES

The Assistant Director found claimant suffered a work-related low-back injury on September 12, 1996. After receiving conservative medical treatment for the injury, claimant returned to work for respondent at a comparable wage. Therefore, the Administrative Law Judge found claimant not entitled to a work disability and awarded claimant a seven percent permanent partial general disability based on her functional impairment. See K.S.A. 1996 Supp. 44-510e. The respondent was also ordered to pay claimant temporary total disability benefits, medical expenses, unauthorized medical expenses, and future medical expenses upon application to the Director.

Respondent contends claimant is not entitled to workers compensation benefits because she failed to prove she suffered a work-related accidental injury. Further, if it is found that claimant suffered a work-related accidental injury, then respondent contends claimant failed to provide respondent with timely notice of accident. Also, respondent asserts the record establishes that claimant had a preexisting functional impairment before the September 12, 1996, alleged accident date and there was no increase in her functional impairment after September 12, 1996.

Claimant requests that the Appeals Board affirm the Administrative Law Judge's seven percent permanent partial general disability award. But claimant, in her brief, also argues the record proves she is entitled to weekly temporary total disability benefits in excess of the 17.57 weeks awarded by the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

On the date of the regular hearing, February 11, 1998, claimant was 55 years of age and had been employed by the respondent since 1979. Claimant is a native of Thailand and immigrated to the United States in 1973. She can not read English and has a difficult time communicating and understanding English.

Claimant alleged that on September 12, 1996, she was working her regular shift from 6 p.m. to 6 a.m. as a line operator in the production of florescent light bulbs. At about 5:30 a.m., claimant was hit by a side loader that knocked her down to a track located on the factory floor. Claimant fell on her left side that caused a bruise to her left hip and skinned her left leg.

No one witnessed the fall. But two of claimant's fellow employees, Gene E. Cory and Jane Niederwerder, testified that claimant told them she had fallen and showed them her injuries. Neither employee, however, could pinpoint the actual date claimant fell. Claimant did not notify her supervisor, Steve Grospitch, that she fell because at that time she was in little pain or distress and it was almost time to go home. The accident occurred near the end of the Wednesday night shift that ended at 6 a.m. on Thursday morning.

Claimant testified, after the accident, her low back become symptomatic and she suffered severe pain. Within two days after the accident, she sought medical treatment on her own. Claimant was seen by Alan K. Wedel, M.D. Claimant continued to work until Dr. Wedel took her off work in October of 1996. Claimant remained under Dr. Wedel's care until he released claimant to return to work on March 1, 1997, without restrictions.

The two main points of controversy in this case are claimant's alleged September 12, 1996, accident date and her previous low-back problems. First, respondent presented attendance records through claimant's supervisor, Steve Grospitch, and payroll records that show claimant did not miss any work in September 1996. Claimant testified she was injured on Thursday morning September 12, 1996, and sought medical treatment two days later through Dr. Wedel on September 14, 1996. She testified she did not work on Monday, September 16, 1996, because of her continuing pain and discomfort. She did return to work on Tuesday, September 17, 1996, but did not work the following week because of Dr. Wedel took her off work.

Claimant's treating physician, Dr. Wedel, did not testify, but his medical records were made a part of the record by stipulation. Those records indicate he saw claimant on August 30, 1996, for low-back pain and right lower extremity muscle cramping. Claimant testified she went to see Dr. Wedel on August 30, 1996, because her back was hurting but she did not know whether or not work had caused the symptoms.

Claimant made a follow-up visit to Dr. Wedel on September 20, 1996, and at that time showed the doctor medical records from a previous left nephrectomy. Claimant testified she was concerned about her back pain because her left kidney was surgically removed in 1978. The next note in Dr. Wedel's medical records indicates claimant called on October 7, 1996, and reported severe low-back pain. She requested to see the doctor at that time. This note also coincides with supervisor Mr. Grospitch's attendance record that shows claimant called in on October 7, 1996, unable to work.

Dr. Wedel saw claimant on October 8, 1996, with complaints of severe low-back pain. The doctor took claimant off work and placed her in a physical therapy program. Claimant was seen again on October 14, 1996, this time claimant had pain in the left sacroiliac region radiating into her left lower leg. The doctor prescribed anti-inflammatory medication and scheduled claimant to undergo an MRI scan on October 17, 1996. The MRI scan showed a herniated nucleus pulposus on the left at L5-S1 with left sided sciatica.

At Dr. Wedel's direction, claimant underwent conservative treatment for her back and left leg pain until her condition improved. She was released to work without restrictions on March 1, 1997. During that period of treatment, Dr. Wedel also referred claimant to Ali B. Manguoglu, M.D., a neurosurgeon, for consultation. Dr. Manguoglu did not testify but his medical records were also stipulated to as part of the record. Dr. Manguoglu did not recommend surgery but did recommend an epidural steroid injection. That was done on January 10, 1997.

Claimant's medical history also showed she had been previously treated for low-back complaints in 1993 and 1994. Respondent argues that claimant had continuing low-back problems from 1993 until her alleged September 12, 1996, injury. Respondent argues that any disc herniation or degenerative disc disease claimant presently has preexisted the September 12, 1996, accident.

Respondent had orthopedic surgeon C. Reiff Brown, M.D., review claimant's medical treatment records. And without personally interviewing or examining the claimant, he concluded that on August 30, 1996, claimant had a 5 percent impairment of function as the result of her low-back condition based on the Fourth Edition of the AMA Guides. The doctor went on to opine that he found no increase in claimant's impairment of function after her alleged September 12, 1996, accident.

Claimant's attorney had claimant evaluated by orthopedic surgeon Terrance C. Tisdale, M.D. Dr. Tisdale examined claimant on April 28, 1997. He found claimant to have a herniated disc at L4-5 on the left with right foraminal stenosis at L4-5. Based on the Fourth Edition of the AMA Guides, Dr. Tisdale assessed claimant with an eight percent impairment of function with one percent for the foraminal stenosis. He, however, admitted the one percent for the foraminal stenosis was a preexisting condition.

Orthopedic surgeon Charles Erik Nye, M.D., was appointed by the then presiding Administrative Law Judge to perform an independent medical examination of claimant. Dr. Nye diagnosed claimant with a disc herniation on the left at L5-S1 with degenerative disc changes of the lower lumbar spine. Dr. Nye attributed claimant's herniated disc either to her work-related accident or opined that the herniated disc was permanently aggravated by the trauma caused by the accident. He assessed claimant with a seven percent functional impairment in accordance with the Fourth Edition of the AMA Guides.

The Administrative Law Judge's finding that claimant suffered a low-back injury while working for the respondent should be affirmed. But the Appeals Board concludes, for the reasons set forth below, the more plausible date that claimant fell at work and suffered the low-back injury is October 3, 1996, and not September 12, 1996, as testified to by the claimant.

The confusion involving the specific date claimant fell at work is, in part, attributed to claimant's limited understanding of the English language. Claimant testified that she fell

at work near the end of her shift on a Thursday morning. This fall was verified by two of her fellow employees. Respondent's attendance records verify that claimant called in unable to go to work on Monday, October 7, 1996. Claimant testified that her normal work week would be Monday, Tuesday, Wednesday, and every other week, she would work Sunday, Monday, Tuesday, and Wednesday. Dr. Wedel's medical records indicate that claimant called his office on October 7, 1996, complaining of severe low-back pain and wanting to see the doctor. Dr. Wedel saw claimant on October 8, 1996, with low-back pain, tenderness of the lumbar spine with palpation, and pain within increased range of motion.

Claimant then worked the 6 p.m. to 6 a.m. shift on October 8, 1996, and her supervisor, Steve Grospitch, testified that claimant was in pain during that shift and she notified him that she had pain in her left side. After October 8, 1996, Dr. Wedel took claimant off work until October 27, 1996, when claimant returned to work for only four days and then remained off work under Dr. Wedel's care until released on March 1, 1997. The October days claimant worked and was off work are all verified by Mr. Grospitch's attendance record and respondent's payroll records.

Respondent points out that the claimant has the burden to prove all the elements of her claim and she has failed to prove she sustained an accidental injury at work on the specific date of September 12, 1996. The Appeals Board agrees the record does not prove claimant was injured at work on the specific September 12, 1996, date. But the Appeals Board finds claimant has presented proof she was injured at work some time in October 1996. Claimant has described her fall at work and her subsequent injuries. The fact claimant was injured at work was verified by two of claimant's fellow employees. Further, medical treatment records, attendance records, and payroll records all verify claimant's work-related low-back injury. The Appeals Board as the trier of fact in workers compensation cases is not bound by technical rules of procedure or pleading. Procedural requirements should not be allowed to defeat an otherwise meritorious claim.¹ Thus, in this case, the Appeals Board finds the appropriate date of accident is October 3, 1996.

Although claimant's fellow employee, Jane Niederwerder, did not recall the specific date, she testified that when claimant first missed a week of work, she notified claimant's supervisor, Steve Grospitch, that claimant fell the week before at work. Mr. Grospitch also testified that Ms. Niederwerder had told him that claimant had fallen at work. The Appeals Board concludes respondent through its supervisor had notice of claimant's accident within 10 days as required by K.S.A 44-520.

The Assistant Director's finding that claimant is entitled to a seven percent permanent partial general disability based on her functional impairment should be affirmed.

¹See Craig v. Electrolux Corporation, 212 Kan. 75, 81, 510 P.2d 138 (1973); Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 205, 756 P.2d 438 (1988).

The Appeals Board finds, as the Assistant Director found, that the most persuasive medical evidence contained in the record are the opinions of Dr. Nye and Dr. Tisdale. Both orthopedic surgeons had the opportunity to personally interview and examine the claimant, where C. Reiff Brown, M.D., who testified on respondent's behalf, only arrived at his opinions by examining the claimant's medical records. Both Dr. Nye and Dr. Tisdale found claimant's functional impairment resulting from this work-related accident was seven percent. Dr. Tisdale found a total of eight percent with one percent for a preexisting foraminal stenosis condition not caused or aggravated by this accident.

Additionally, neither Dr. Nye nor Dr. Tisdale found that any of the seven percent was attributed to a preexisting low-back condition. They found that any preexisting episodes claimant had with her low back had resolved before she suffered this work-related injury.

Claimant's attendance record, payroll records, along with Dr. Wedel's medical treatment records, when read together, sets out the weeks that claimant was under Dr. Wedel's care and unable to work. The Appeals Board finds that based on those records, claimant was unable to work from October 9, 1996, through October 26, 1996, or 2.57 weeks and from October 31, 1996, through March 1, 1997, or 17.43 weeks entitling claimant to 20 weeks temporary total disability benefits.

All other findings of the Assistant Director that relate to payment of past medical, future medical, and unauthorized medical expenses are adopted by the Appeals Board as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by then Assistant Director Brad E. Avery dated June 25, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Noi Pearson, and against the respondent, North America Philips Light Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred October 3, 1996, and based upon an average weekly wage of \$622.68.

The claimant is entitled to 20 weeks of temporary total disability compensation at the rate of \$338 per week or \$6,760.00, followed by 28.7 weeks at the rate of \$338 per week or \$9,700.60 for a 7% permanent partial functional disability, making a total award of \$16,460.60.

As of May 28, 1999, the entire award of \$16,460.60 is due and owing claimant and is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board approves and adopts all remaining orders set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
C. Stanley Nelson, Salina, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director